Nexrubbertec Sdn Bhd v Beard Juggling (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22NCVC-212 OF 2010
PRASAD ABRAHAM J
18 SEPTEMBER 2011

Restitution — Quantum meruit — Work done — Parties falsely thought they were contractually bound — No binding contract in law — Whether parties entitled to restitutionary relief for work done

Pursuant to discussions between the plaintiff and the defendant to enter into a business venture to produce rubber by-products, for which the plaintiff had the machinery ('the plant') and the defendant, the markets, the former set out the basis of the joint venture in a letter to the latter. Together with the letter, the plaintiff alleged it also sent the defendant a non-disclosure agreement and a draft collaboration agreement. The plaintiff also transferred the plant to the defendant's premises. The plaintiff contended that the defendant's failure to sign the collaboration agreement was oppressive and unlawful. The defendant, on its part, denied the plaintiff's allegations and contended it had a lien over the plant until the expenses it had incurred as a consequence of arrangements with the plaintiff had been settled. Both parties had conducted themselves as if they were contractually bound.

Held:

(1) The plaintiff's letter to the defendant did not constitute a binding and effectual contract because it envisaged the formation of a joint venture company to be the vehicle for arrangements to be implemented. This required a joint venture agreement setting out the rights and respective shareholdings of the parties and how the plant was to feature in it. None of these matters, nor the incorporation of the joint venture nor the plaintiff's obtaining of financial support, had been finalised. The defendant had also not signed any of the documents sent to it (see paras 2(a)–(b)).

(2) Both parties acted as if there was a binding contract when there was none. Though there was no contract, the parties were entitled to restitutionary relief as benefits had been derived from work done (see para 7).

[Bahasa Malaysia summary

Berikutan perbincangan di antara plaintif dan defendan untuk memasuki usaha niaga bagi mengeluarkan produk sampingan getah yang mana plaintif

memiliki mesin ('mesin') dan defendan, pasaran, plaintif menetapkan asas usaha sama di dalam surat kepada defendan. Bersama-sama dengan surat tersebut, plaintif mendakwa ia juga menghantar kepada defendan perjanjian ketakdedahan dan draf perjanjian kerjasama. Plaintif juga memindahkan mesin tersebut ke premis defendan. Plaintif berhujah bahawa kegagalan defendan untuk menandatangani perjanjian kerjasama tersebut adalah menindas dan menyalahi undang-undang. Defendan, bagi pihaknya, menafikan tuduhan-tuduhan plaintif dan berhujah yang ia mempunyai lien ke atas mesin tersebut sehingga perbelanjaan yang ditanggungnya akibat pengurusan dengan plaintif telah diselesaikan. Kedua-dua pihak telah bertindak soalah-olah mereka terikat dengan kontrak.

Diputuskan:

(1) Surat plaintif kepada defendan tidak membentuk kontrak yang mengikat dan berkesan kerana ia membayangkan pembentukan syarikat usaha sama untuk menjadi alat kepada pengurusan dilaksanakan. Ini memerlukan perjanjian usaha sama yang menetapkan hak-hak dan pemegangan saham pihak masing-masing dan bagaimana mesin tersebut ditonjolkan di dalamnya. Tidak satupun perkara ini, juga bukan penggabungan usaha sama dan juga bukan pemerolehan plaintif terhadap sokongan kewangan, telah diselesaikan. Defendan juga tidak menandatangani apa-apa dokumen yang dihantar kepadanya (lihat perenggan 2(a)–(b)).

(2) Kedua-dua pihak bertindak seperti terdapat kontrak mengikat antara mereka tetapi sebenarya tiada. Walaupun tidak terdapat kontrak, pihak-pihak berhak kepada relief restitusi memandangkan faedah-faedah telah berbangkit daripada kerja-kerja yang dilakukan (lihat perenggan 7).]

Notes

For cases on work done, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2242–2243.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Sdn Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)

British Steel Corp v Cleveland Bridge & Engineering Co Ltd [1984] 1 All ER 504, HC (refd)

Turriff Construction Ltd v Regalia Knitting Mills Ltd (1971) 9 BLR 20 (refd)

Ismail Mohd Ariffin (Juriah bt Rabuson with him) (Ram Reza & Muhammad) for the plaintiff.

K Lopez (Kamarudin & Partners) for the defendant.

Prasad Abraham J:

[1] The brief facts of this matter are briefly set out below. The plaintiff and the defendant had several discussions on a possible business venture which would involve the setting up of a 'crumbling plant' ('the said plant'). It was a question of the plaintiff and the defendant being drawn together because of mutual commercial interests ie the plaintiff already having a plant with ready lines and the defendant the markets to explore the products ie rubber by products.

[2] The salient document to look at is the letter of the plaintiff to the defendant dated 29 December 2009 on p 21 of bundle B which set out the basis the parties were to venture into together. The plaintiff contends that this letter reflects the joint venture between the parties as with the letter, a non disclosure agreement and a draft collaboration agreement was sent to the defendant. This was denied by the defendant. Subsequently the plaintiff physically transferred the said plant to the defendant at the defendant's premises. Subsequently the defendant continued to refuse to sign the collaboration agreement and the plaintiff contends that the action of the defendant was oppressive and unlawful (see the plaintiffs statement of claim (p 1 para 19 bundle B). The defendant denies the same and contends the defendant has incurred expenses as a consequence of arrangements with the plaintiff and are in essence claiming a lien over the said plant till these expenses are paid and also for breach of the collaboration agreement. The court finds having reviewed the evidence of the plaintiff and DW1, finds the letter at p 21 of bundle does not constitute a binding and effectual contract for the following reasons:

(a) the letter itself envisages the formation of a new joint venture company ('JV') which will form the vehicle for these arrangements to be implemented. This would require a joint venture agreement which will set out rights of parties in the joint venture company, their respective shareholding and how the said plant is to be reflected in the JV company. None of these have yet to be finalised including the incorporation of the new JV company;

(b) none of the documents sent to the defendant were signed by the defendant; and

(c) this arrangement was also predicated on the plaintiff obtaining financial support from MTDC which was yet to materialise.

[3] Having made that finding, how then can the relationship between the plaintiff and the defendant be categorised. The evidence clearly shows the said

plant was moved to the defendant premises was worth RM500,000 and the defendant contends it also undertook obligations on its part.

[4] In this day and age where commercial transactions have become fairly sophisticated, it is difficult at times to take a pure classicus approach of offer and acceptance and even if it was 'subject to contract', the contract would be binding and enforceable. In many such arrangements, parties would have to carry out obligations before they reach the stage of a binding contract being in force. For example in anticipation of a binding contract, a party may have to commission a due diligence exercise on its assets as part of its obligations and incur the cost and yet the arrangements maybe called off. I am also of the view the party concerned would not be able to argue a breach of a binding contract on the basis of the due diligence exercise.

[5] Looking at the letter of the plaintiff at p 21 of bundle B and the conduct of both the plaintiff and the defendant, it is clear that both parties had conducted themselves as it they considered a contract binding in law was in force. However that will not assist this court in determining whether there was a contract in force which I have found there was not. Both the plaintiff and the defendant may been optimistic about a binding contract being in force but there was none. Both parties acted as it there was a binding contract when there was none (see *Turriff Construction Ltd v Regalia Knitting Mills Ltd* (1971) 9 BLR 20 NB p 21 NB the judgment of Justice Fay).

[6] Even though I have found there is no contract, parties may be entitled to restitutionary relief as benefits had been derived from the work already done (see Cheshire, Fitoot & Furnston & Pang) *The Law of Contract* at p 130 Singapore & Malaysian Edition.

[7] I refer to the judgment of His Lordship Robert Goff J in *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All ER 504 at p 511) where His Lordship said and I quote:

> In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work which

he would not have had to pay for as such if the anticipated contract had come into existence, eg preparatory work which will, if the contract is made, be allowed for in the price of the finished work (cf *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712,; [1957] 1 WLR 932). This solution moreover accords with authority: see the decision in *Lacey v Davis*, the decision of the Court of Appeal in *Sanders & Forster Ltd v A Monk & Co Ltd* [1980] CA Transcript 35, though that decision rested in part on a concession, and the crisp dictum of Parker J in *OTM Ltd vendor Hydranautics* [1981] 2 Lloyd's Rep 211 at p 214, when he said of a letter of intent that its only effect would be to enable the defendants to recover on a quantum meruit for work done pursuant to the direction contained in the letter. I only wish to add to this part of my judgment the footnote that, even if I had concluded that in the circumstances of the present case there was a contract between the parties and that the contract was of the kind I have described as an 'if contract, then I would still have concluded that there was no obligation under that contract on the part of BSC to continue with or complete the contract work, and therefore no obligation on their part to complete the work within a reasonable time, However, my conclusion in the present case is that the parties never entered into any contract at all.

[8] The aforesaid reasoning was adopted by the Supreme Court in *Ayer Hitam Tin Dredging Malaysia Sdn Bhd v YC Chin Enterprises Sdn Bhd* reported in; [1994] 2 MLJ 754.

[9] Based on the aforesaid cases I made the following orders in respect of the claim and the counterclaim ie:

(a) *suatu perintah dikeluarkan untuk plaintif mengambil balik semula peralatan makmal milik plaintif yang terletak di dalam premis defendan dengan serta merta*;

(b) damages to be assessed on a restitutionary basis by the *timbalan pendaftar*;

(c) costs to be deferred and determined after the assessment of damages;

(d) damages on a restitutionary basis to be assessed by the *timbalan pendaftar* and paid by the plaintiff to the defendant;

(e) costs to be deferred and determined after the assessment exercise; and

(f) the exercise of assessment of damages for both the plaintiff and the defendant to be heard together.

Order accordingly.

Reported by Ashok Kumar